IN THE SUPREME COURT
OF
COLORADO

NO. 27963

THE PEOPLE OF THE STATE OF COLORADO, by and through their duly appointed representative, FRANK G. E. TUCKER, DISTRICT ATTORNEY,

Petitioner,

v.

THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT,

Respondent.

OCT 23 1978

Frank G. E. Tucker, District Attorney,
Robert L. Russel, District Attorney,
Milton K. Blakey, Chief Deputy District Attorney,

Attorneys for Petitioner.

Kenneth Dresner,
Kevin O'Reilly,

Attorneys for Respondent.

and

NO. 28049

THE PEOPLE OF THE STATE OF COLORADO ex rel. ROBERT R. GALLAGHER, JR., DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT, STATE OF COLORADO,

Petitioner,

v.

THE DISTRICT COURT, IN AND FOR THE EIGHTEENTH JUDICIAL DISTRICT, COUNTY OF ARAPAHOE, STATE OF COLORADO, and THE HONORABLE WILLIAM B. NAUGLE, ONE OF THE JUDGES THEREOF,

Respondents.

Original Proceeding

EN BANC

RULE DISCHARGED

Robert R. Gallagher, Jr., District Attorney,
James C. Sell, Chief Deputy District Attorney,

Attorneys for Petitioner.

Kenneth K. Stuart,
Jane S. Hazen,

Attorneys for Respondents.

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

(1976). Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The confusion has been magnified by subsequent pronouncements. Harry Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); and Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

The United States Supreme Court's seminal opinion in Furman v. Georgia, supra, created considerable confusion concerning the circumstances under which the death sentence could be constitutionally imposed. The Supreme Court, in invalidating the Georgia death penalty statute, supported their result with a short per curiam opinion and nine separate opinions, some of which are basically irreconcilable. No unifying rationale was provided for the guidance of legislative bodies of the different states. The elements of a constitutional death penalty statute have been touched on, without clarity of definition, in a number of later cases from that Court.

In 1976, the Supreme Court expanded on some of the views expressed in Furman. See Gregg v. Georgia, supra; Jurek v. Texas, supra; Woodson v. North Carolina, supra; Proffitt v. Florida, supra. Again, the Supreme Court's inability to agree on a set of principles within which to judge a particular statute made it difficult for a state legislature to enact a

penalty and other punishments requires that before the solemn act of condemning another human being to death may be carried out, the Eighth and Fourteenth Amendments of the United States Constitution[2] require that the judge or jury in every case must:

> "[B]e allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, supra, at 271 (plurality opinion, Stevens, J.). (Emphasis added)

The Colorado statute in issue was drafted before the Lockett opinion was announced. All three trial judges have properly held that section 16-11-103, C.R.S. 1973 (1976 Supp.), violates the constitutional commandment now set forth in the Lockett case, because it does not allow the sentencing entity -- in these cases, the jury -- to hear all the relevant facts relating to the character and record of the individual offender or the circumstances of the particular case. Woodson v.North Carolina, supra, at 304 (plurality opinion, Stewart, J.).

A statute must meet at least two requirements before it can serve as the basis for imposition of the death sentence. First, it must provide a "meaningful basis for distinguishing the . . . cases in which it is imposed from [those] in which

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[2] We express no opinion about the limits on punishment imposed by Article II, Section 20 of the Colorado Constitution.

it is not." Furman v. Georgia, supra, at 313 (White, J., concurring). To do so, the statute must contain "objective standards to guide, regularize and make rationally reviewable the process for imposing a death sentence." Woodson v. North Carolina, supra, at 303 (plurality opinion, Stewart, J.). To attain this end, the legislature may enumerate specific aggravating factors, the presence of which will serve to justify the imposition of a sentence of death, Gregg v. Georgia, supra; Proffitt v. Florida, supra, or the legislature's "action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." Jurek v. Texas, supra, at 270 (plurality opinion, Stevens, J.).[3]

The second requirement is that, as noted above, the defendant must be allowed to present any relevant information as to why the death sentence should not be imposed upon him.

Colorado statutes provide a bifurcated proceeding for these cases in which the death penalty is sought. At the first stage of the proceedings, the substantive question of the defendant's guilt is tried. If he is convicted of a class one felony, such as first degree murder, the same jury then hears evidence concerning the proper penalty. Section

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[3] Section 16-11-103(6), C.R.S. 1973 (1976 Supp.) adopts the first alternative by listing several aggravating factors. We express no opinion whether this enumeration is constitutionally sufficient.

16-11-103(5), C.R.S. 1973 (1976 Supp.) lists five mitigating factors on which the defendant may present evidence. Section 16-11-103(6) lists eight aggravating factors which the People may prove were involved in the commission of the crime. If the jury finds that none of the mitigating circumstances, and any one of the aggravating circumstances, existed at the time the crime was committed, it must impose the death sentence. Any other combination of findings results in a sentence of life imprisonment. In pertinent part, Section 16-11-103 provides:

> "(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section. . . .
>
> . . . .
>
> "(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:
>
> "(a) He was under the age of eighteen; or
>
> "(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
>
> "(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

"(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

The people would have us construe Section 16-11-103(2), C.R.S. 1973 (1976 Supp.) so as to allow the judge or jury to hear all relevant mitigating facts about the offender and his offense, as required by Lockett, supra. We are unable to do so. Subsection (2), although it speaks of "any information relevant," clearly precludes the offender from proffering any information unless it is relevant to the mitigating factors "set forth in subsection (5)."

In lieu of a finding that we can read subsection (2) to meet the constitutional requirements of Lockett, the people would have us construe subsection (5) to allow the offender to present the necessary information in mitigation. Again, we decline. We note a number of impediments to such a construction.

First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence "at the time of the offense." Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 382 A.2d 442, 449-50, n. 19 (Pa. 1977).

Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.

Third, subsection (5) does not permit the offender to attempt to establish a number of mitigating circumstances which are among those the Supreme Court has declared the judge or jury must be allowed to consider.

> "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts . . . ." Harry Roberts v. Louisiana, supra, at 637.

> "[A]ny special facts about this defendant that mitigate against imposing capital punishment (e.g., . . . the extent of his cooperation with the police, his emotional state at the time of the crime." Gregg v. Georgia, supra, at 197 (plurality opinion).

An offender would also be precluded by subsection (5) from proving to the judge or jury that he has rendered or could in the future render some service to his community, in light of which capital punishment should not be imposed. In short, subsection (5) prevents consideration of a host of "factors too intangible to write into a statute." Gregg v. Georgia, supra, at 222 (White, J., concurring); factors "which a jury might . . . consider mitigating and, as a result, might . . . be moved to impose a life sentence."

Jones v. People, 155 Colo. 148, 150, 393 P.2d 366 (1964); see also Richmond v. Cardwell, 450 F.Supp. 519 (D. Ariz. 1978).

Defendants also urge that the death penalty may not be imposed in Colorado because those sentenced to death by a jury could not obtain constitutionally adequate appellate review. In support of that contention, they point to Section 18-1-409, C.R.S. 1973, which provides:

> "Appellate review of sentence for a felony. (1) When sentence is imposed upon any person following a conviction of any felony, other than a class 1 felony in which the penalty was decided upon by a verdict of the jury, the person convicted shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based."

In view of our decision that section 16-11-103, C.R.S. 1973 (1976 Supp.) is unconstitutional, we need not reach the question whether section 18-1-409 precludes review of a death sentence by this court.

Accordingly, the rule to show cause is discharged.

Issue:

Is Colo. Death Penalty statute unconst. for too narrowly permitting consideration of Mitigating factors (character & record.)

Furman v. Georgia - thrust was to condemn unbridled jury discretion. (8th Am) - The requirement is "standards or guidelines" that prevent the penalty from being "arbitrarily or freakishly" imposed.

Most states - like Colorado have set up statutory schemes that provide for consideration of certain ag. or mit. factors.

Gregg - GA
Rep. - Fla
JURGK - TEX
LOCKETT - OHIO.

Gregg vs Georgia -

Stat.: P. 3253-

- Ed. sent procedure

1. at sent. hearing judge (jury) to hear evid. in extenuation or mitigation & agg. [INCL. RECORD]
- D accorded subst. latitude in types of evid. he may introduce.

FLA. CT INTERP.

2. Sent. determined by judge (jury) assessment of ag. & mit. circ "otherwise authorized by law" and 10 STAT. Ag. circ. by statute. MUST FIND ONE.

3. To impose death, must find one STAT. of ag. circ. - beyond a reas. doubt - and elect death.
- Judge bound by jury finding.

(P. 3263 - DISC. of RECORD & YOUTH. —
- CHARACTERISTICS of OFFENDER.

PROFFITT v. Fla. -

STAT: p. 3278 -

- Ag. Circ. - 8 in NO - very similar to Colo. Stat.

① - Mit Circ.:

1. (a) Δ has no sig. history of prior crim. activity.
   b. Act comm. w/ Δ under extreme mental or emotional disturbance.
   c. Victim a participant in Δ's conduct or consented.
   d. Minor participation
   e. extreme duress.
   f. Δ's capacity to conform conduct & law substt. impaired.
   g. age of Δ.

Proc: Evid. may be presented on any matter the judge deems relevant to sentencing and MUST include evid. bearing on statut. ag & mit circ..

- Jury decides if mit circ. OUTWEIGH Ag. Circ.
- by maj. vote - give ADVISORY verdict.

- Judge - reweighs. - makes finding of fact.

Jurek v Tex. - p. 3284
- No spec. set of stat. agg or mit. factor.
3 jury question. - Beyond Rea Doubt.
1. Was it deliberate w/ exp. & cause death.
* 2. Was a probability that D would commit
cr. act of viol. that would create a continuing
threat to society.
3. if the conduct of D was unreasonable in response to prov. by
v.

- On quest. #2. -
- p. 3285 - jury to look at age of D -
record of prior crim. act.
duress or
other mental cond. -

Woodson. - 3294 - CHARACTER & RECORD -
- A system that provides no consideration
of character & record ~~of~~ a circ. of part.
Offense ... excl. cons. of human factor. -

Ariz v. Richmond

- Ariz Stat. Identical to Colo. except age of D.
- Strict Constr.

—

Argument:

Lockett v. Ohio -

- Sentencer must not be precluded from consideration as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death.

Footnote 12: p. 17 -

Dens. power to exclude evid. not bearing on chs. - record. or offense

The requirement:

The jury must be able to evaluate the defendant's prior record, character & offense. -

The Statute -

1. Hearing shall be conducted
2. Pros - Def shall be perm to offer evid & shall be perm. to rebut evid of the other party.
3. "Character" & Record -

- NOT A FACTOR PER SE. - Green: Proffer on Record.

- Adm. of Evidence to show. -
  1. Character of the D. -
  2. Absence of criminal history. -

- Is it relevant under our statute:
  - Ag.
  - To negate ag. factor (a) NO PRIOR CAR OFF.
    (d) Neg. MENTAL STATE -
    (e) PLANNING of CRIME.
  - (H) - TO NEGATE HIS PERP. of (I) = CRIME IN SOME MANNER.

MITIGATION:

1. Factors of Age - Absent - Crim History.

- All focus on D. - a - obvious
b. capacity & app. wrongfulness.
c. duress
d. min participant.

all go to min. culpability.

Key is capacity & app. wrong & foreseeability. —

- Factors do go to Chm & sp.

DISTINGUISH — F/A. — NOT AN ABSOLUTE — WEIGHING. —

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27963

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY Petitioner, vs. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT Respondents.	)	REPLY BRIEF OF PETITIONER

ROBERT L. RUSSEL
District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

MILTON K. BLAKEY
Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

On December 30, 1977, Petitioner filed this Original Proceeding and on January 5, 1978, this Court granted a Rule to Show Cause.

Respondents, after a considerable extension of time, filed their brief on April 27, 1978, and Petitioner was granted until July 15, 1978, to reply. Due to the decision in Lockett v. Ohio, decided July 3, 1978, the Court granted Petitioner until July 25, 1978, to file its reply.

The defendant, Theodore Robert Bundy, escaped from Garfield County Jail on December 31, 1977, and was recaptured in Florida where he now faces state charges. Extradition proceedings have been commenced and Governor Richard Lamm has sent his requisition to Governor Askew of Florida.

The defendant is not now in Colorado custody and no trial date has been set.

SUMMARY OF ARGUMENT

THE COLORADO DEATH PENALTY STATUTE WHICH ALLOWS THE JURY TO HEAR EVIDENCE IN AGGRAVATION AND MITIGATION, PROVIDES ADEQUATE STANDARDS AGAINST WHICH TO MEASURE THE DEFENDANT"S RECORD AND CHARACTER THUS PREVENTING ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.

ARGUMENT

Unlike the mandatory death penalty statutes which have consistently been held unconstitutional by the U.S. Supreme Court, Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978 (1976), Stanilaus Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001(1976), and Harry Roberts v. Louisiana ___U.S.___, 97 S. Ct. 1933,(1977), the Colorado statute providing for imposition of the death penalty establishes a bifurcated trial the second phase of which deals specifically with the aggravating and mitigating factors relevant to both the offense and the offender. Such a

In Proffit v. Florida, the Florida statute was examined. It provided for application of the death penalty if the court, after advisory vote of the jury, finds that the mitigating factors outweigh the aggravating factors. The Florida statute enumerates eight aggravating factors to which the court is limited and lists six mitigating factors but does not specifically limit the court to consideration of these factors.

Two clear and important distinctions should be drawn between this statute and the Colorado statute. First, it is not applied by a jury except in an advisory capacity. Second, a finding of a mitigating factor, statutory or otherwise, does not bar application of the death sentence.

I would suggest, therefore, that what the court is permitting here is wide latitude in the introduction of evidence that may affect the court's (jury's) finding of statutory aggravating or statutory mitigating factors. To do otherwise would make intelligent and meaningful jury instructions impossible and would surely lead us back into pre-Furman uncertainty.

Interpretation of the Colorado statute to allow broad latitude in introduction of evidence would effect the same result.

The Texas procedure examined in Jurek v. Texas was considerably different. The Texas statute did not establish a list of aggravating and mitigating factors, but rather gave the jury three interrogatories:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence

that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." 96 S. Ct. at 2955

The court simply held that as interpreted by the Texas court, the second question brought before the jury "whatever mitigating circumstance relating to the individual defendant can be adduced". 42 U.S. 2628, at 276

Again the court looked to liberal state court interpretation to find adequate standards and safeguards.

The most recent opinions Lockett v. Ohio, S. Ct. No. 76-6997, 23 Cr.L3215, (decided July 3, 1978), and Bell v. Ohio S. Ct. No. 76-6513, 23 Cr.L3229 (decided July 3, 1978), examined the Ohio death penalty statute and held it unconstitutional.

Here a plurality of four Justices concurred in holding that the Ohio statute was invalid as it precluded consideration "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett v. Ohio, Cr.L.3215, at 3220.

Let us then consider the evidence admissable and the applicability of the mitigating factors in the Colorado statute Colorado Revised Statutes, 16-11-103, (5), 1973, as amended, provides:

"(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:
(a) He was under the age of eighteen; or
(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
(d) He was a principal in the offense, which was committed by another but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

All of these factors are relevant to the defendant's character. While age is in and of itself a mitigating factor only if he is under eighteen. His age, education and experience in life, including the absence of prior criminal activity, are all certainly relevant as bearing upon his "capacity to appreciate wrongfulness of his conduct" and his ability to forsee that "the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person".

The Ohio statute provides a set of criteria for imposition of the death penalty after one has been found guilty of aggravated murder. These are set out in section 2929.04 of the Ohio Revised Code as follows:

"§2929.04 Criteria for imposing death or imprisonment for a capital offense.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:
(1) The offense was the assassination of the president of the United States or person in line or succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
(2) The offense was committed for hire.
(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punnishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:
(1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The first seven of these factors are the aggravating factors which pertain to the nature of the offense. The last three are focused upon the offender. As it can readily be seen here, the factors do not take account of the individual participation in the crime, so that one who is a complicitor in a felony murder cannot avoid the death penalty even though the killing was not foreseeable or his participation was minor. It likewise does not consider the age of the defendant nor his capacity to appreciate the wrongfulness of his actions.

In regard to this limitation, the court held:

> ". . . The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." 23 Cr.L. 3215 at 3221.

In this respect, the concurring opinions of Mr. Justice Blackmun and Mr. Justice White are even more pungent. Mr. Justice Blackmun states:

> "The more manageable alternative, in my view, is to follow a proceduralist tact, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. . . . A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force . . ." 23 Cr.L. 3215, 3224

Colorado does not suffer such deficiency. It provides for the "unforeseeable" result and "minor involvement" which is obviously a prime consideration in the Lockett case.

CONCLUSION

It is well settled that the death penalty is not per se cruel and unusual and is held so only when the procedures established for its application are so broad as to create a risk that "arbitrary", "capricious" or "freakish" application will result. This is clearly not the case in Colorado as our statute provides clear guidelines focusing the attention of the sentencing body on the "character and record of the individual offender and the circumstances of the particular offense".

It is therefore submitted that Colorado Revised Statute 16-11-103, 1973, as amended is constitutional and the rule is this case should be made absolute.

Respectfully submitted,

ROBERT L. RUSSEL (3043)
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CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing to Kevin O'Reilly, Box 1635, Glenwood Springs, Co., 81601, Hon. George E. Lohr, District Court Judge, Pitkin County Courthouse, Aspen, CO 81611 and the Supreme Court of the State of Colorado, 2 E. 14th Avenue, Denver, Colorado 80203, this 25th day of July, 1978.

Micah Collins

16-11-103. Imposition of sentence in class 1 felonies. (1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

absence of record

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him, or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means:

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner.

Source: Repealed and reenacted, L. 74, p. 252, § 4.

Editor's note: This section became effective January 1, 1975, and applies to offenses occurring on or after said date.